

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEON BENEK,

Plaintiff,

v.

KANSAS CITY LIFE INSURANCE
COMPANY, a Missouri corporation doing
business in Washington, and its wholly owned
subsidiary SUNSET LIFE INSURANCE
COMPANY OF AMERICA, a foreign
corporation doing business in Washington,

Defendants.

Case No. C07-5142FDB

ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL THIRD
PARTIES' COMPLIANCE WITH
SUBPOENA

Defendants (and Cross-claimants) served a subpoena duces tecum for documents on Benek Financial Group, Benek Insurance and MML Insurance Agency, believing that Plaintiff Leon Benek was/is affiliated with these agencies and that they have documents relevant to this case.

Benek, an independent insurance agent, was authorized by Defendants to sell their insurance products in Washington. Benek's agreements with Defendants provided that he forfeited any amounts due under the contracts if he replaced or assisted in replacing a policy issued by Defendants with that of another carrier. Kansas City Life's Counterclaim alleges that with respect to certain

1 numbered policies for which Defendants had to refund premiums owing to Benek's errors, Kansas
2 City Life demanded a refund on the commissions paid to Plaintiff for those policies. Benek has
3 refused to pay the demand. Then the Counterclaim alleges that in January 2007 and thereafter,
4 Benek replaced one or more of Defendants' policies with policies of other insurers in violation of his
5 contracts with Defendants. Benek's breaches resulted in forfeiture of any renewal commissions
6 otherwise due under the contracts. Benek was terminated effective January 31, 2007. Defendants
7 assert that on the termination date, Benek owed them \$100,095.75 on the commissions paid for the
8 three policies, and that Benek further owed Defendants \$14,776.40 in debts and other charges
9 incurred before termination of the contracts.

10 The subpoena duces tecum at issue sought the following documents from Benek Financial
11 Group, Benek Insurance, and MML Insurance Agency (the Third Parties) : "policy files for policies
12 that replaced Defendants' coverage for the period of approximately six months before his
13 relationship with Defendants ended to the present, documents showing his employment or
14 compensation agreements with other insurers, and policy files for specific insureds for whom
15 Defendants determined that Defendants' coverage was replaced with that of another insurer.
16 Counsel for the Third Parties, who is also counsel for Leon Benek, objected to the subpoena.

17 Benek contends that Defense Counsel violated RPC 4.2 because he should have called
18 Plaintiff's counsel to first determine whether Benek Financial Group was, in essence, Leon Benek,
19 and he would have been told that it was, and Defense Counsel cannot close his eyes to the obvious.

20 Benek also contends that Defense Counsel violated several rules. First, Benek argues that
21 the Defense violated Fed. R. Civ. P. 45(b)(1) in that they failed to tender fees for attendance and
22 mileage and that notice was not served on Plaintiff's Counsel until the next day after the subpoena
23 was served. Benek also asserts that the Defense missed the deadline for propounding requests for
24 production under Rule 34, and attempt to evade the Rule by serving the subpoena. Finally, Benek
25 argues that the motion to compel violates CR 16(f) because the motion was not filed three weeks

1 before the discovery cut-off date, but only three days, and is, therefore, too late.

2 Defendants argue that failure to give notice is not fatal to the request unless Plaintiff shows
3 prejudice, and, in any event the subpoena was served on Benek at the same time it was served upon
4 the Third Parties, giving Plaintiff time to move to quash. Defendants argue that the documents are
5 relevant, as they are entitled to know what replacement policies Leon Benek solicited or procured
6 both six months before the business relationship was terminated and for policies that Benek replaced
7 after the relationship terminated. Finally, Defendants argue that the subpoena was not directed at
8 Benek in his individual capacity, which is how he appears in this lawsuit, but is directed at three
9 independent entities that are not parties to this case.

10 Having considered the parties' arguments and authorities as well as the record herein, the
11 Court grants Defendants' Motion To Compel Third Parties' Compliance with Subpoena for the
12 following reasons.

13 The Third Parties to which the subpoenas duces tecum are directed are not parties to this
14 case, and Defendants did not violate RPC 4.2 when they served the subpoenas on the Third Parties
15 without consulting Plaintiff's counsel first.


16 No witness or travel fees were required to be tendered to the Third Parties, as they were not
17 being commanded to appear; rather, they were asked to produce documents. Fed. R. Civ. P.
18 45(b)(1) was amended with an effective date of December 1, 2007. The subpoena was issued on
19 December 7, 2007. As the materials sought are highly relevant to the Defendants' contentions,
20 Plaintiff's objections are overruled and the Third Parties are directed to comply with the subpoena.
21 Rule 34 applies to parties and does not apply in these circumstances where the subpoenas are
22 directed at the Third Parties.

23 The subpoenas to the Third Parties were issued on December 7, 2007 before the January 7,
24 2008 discovery cut-off date. Defendants' Motion To Compel the Third Parties' Compliance was
25 filed on January 10, 2008. The Motion to Compel must be granted, notwithstanding, the minor

1 timing error. Where appropriate, Plaintiff may seek a protective order to protect any private
2 information of non-parties; otherwise, the information sought by the subpoena is relevant and must
3 be produced.

4 ACCORDINGLY, IT IS ORDERED: Defendants' Motion To Compel Third Parties'
5 Compliance with Subpoena [Dkt. # 22] is GRANTED.

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7 DATED this 1st day of February, 2008.

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10 FRANKLIN D. BURGESS
11 UNITED STATES DISTRICT JUDGE
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